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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 426

WILLIAM HEIKKILA, *Appellant*,

v.

BRUCE G. BARBER, ETC., ET AL.

Appeal from the United States District Court for the Northern District of California

PETITION FOR REHEARING AND SUGGESTION FOR MODIFICATION OF OPINION

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Appellant petitions for a rehearing of the decision of the Court rendered on March 16, 1953. If rehearing is denied, appellant suggests that the Court modify its opinion in the respect stated below.

I.

The decision of the Court hinges on its construction of the finality provision of section 19(a) of the Immigration Act of 1917. This act is no longer in effect, and the opinion expressly states (footnote 4) with respect to the current immigration legislation: "We do not consider the 1952 Act, 66 Stat. 163, which took effect after Heikkila's complaint was filed."

In our view, the 1952 Immigration and Nationality Ac authorizes injunctive review of deportation orders, and thi is an appropriate case in which to consider and decide tha such is the case.

Appellant believes that injunctive review is permitte under the 1952 Act, and he does not wish to be subjecte to the restraints and indignities which the appellee seek to visit on him under the supervision requirements of sec tion 242(d) of the Act (8 U.S.C. 1252(d)). Accordingly if rehearing is denied, he contemplates instituting a new injunction proceeding to review the validity of the deporta tion order, entered under what he considers to be an un constitutional statute. Thus the only effect of the Court' decision is to set appellant back at the beginning of the lon road to this Court which he has already once travelled. I appellant retraces the journey, he will end up by presentin to the Court the identical procedural and substantive ques tions which are now before the Court, as to which the Cour noted probable jurisdiction, which have been argued an briefed before the Court, and which can now be readil and appropriately disposed of.

Other litigants who have instituted injunction proceed ings to review deportation orders are in a similar situation No matter how far these proceedings may have advanced the plaintiffs will, under the present decision, have thei suits dismissed, with the sole result of compelling them t institute new injunction suits in reliance on the 1952 Act Such a result, we submit, is not in the interests of the efficient administration of the immigration laws or of judi cial review.

The government itself has recognized that it would be appropriate for the Court to consider the effect of the 1952 Act even when the suit was brought before the Act was effective. For in the *Martinez* case the government briefed the availability of injunctive review under the 1952 Act.

II.

That injunctive review of deportation orders is permitted under the 1952 Act appears from its text and its history.

Section 242(b) of the 1952 Act (8 U.S.C. 1252(b)) contains a finality provision as follows:

> In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final.

In its context, it is clear that this finality provision was not intended by Congress to limit judicial review to the habeas corpus remedy. Thus the following subsection, 242(c), provides (emphasis supplied):

> (c) When a *final* order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, *if judicial review is had*, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, *released on bond* in an amount and containing such conditions as the Attorney General may prescribe, or *released on such other condition as the Attorney General may prescribe* . . .

This provision obviously contemplates that judicial review may be had even though the alien is not in custody. Furthermore, the Court's present opinion states that the term "judicial review" in the Administrative Procedure Act does not include habeas corpus. It would not be reasonable, therefore, to construe "judicial review" in the 1952 Immigration and Nationality Act (reported by the same committees that reported the Administrative Procedure Act) as limited to habeas corpus.

Because Congress realized that the injunction remedy was available under the 1952 Act, notwithstanding the

finality provision, it felt it necessary to expressly limit th judicial remedy to habeas corpus in a particular exclusio situation in which it wished to oust injunctive review. Sec tion 360(c) of the Act (8 U.S.C. 1503(c)) provides wit respect to persons seeking to enter the country under disputed claim of American nationality:

> A final determination by the Attorney General that an such person is not entitled to admission to the Unite States shall be subject to review by any court of com petent jurisdiction in habeas corpus proceedings an not otherwise.

The legislative history fortifies our view of the 1952 Act The bills reported by the House and Senate Committee (S. 2550 and H.R. 5678, 82nd Cong., 2d Sess.) designedly omitted provisions in antecedent bills which would have limited judicial intervention to habeas corpus (S. Rep. 1137 82d Cong., 2d Sess., p. 28), probably as a result of opposition voiced by the American Bar Association and the Association of Immigration and Nationality Lawyers (*Joint Hearings before Subcommittees of Committees on the Judiciary on S. 716, H.R. 2379, H.R. 2816*, 82d Cong., 1st Sess., pp. 537, 673).

During the House debate, Representative Walter, in charge of the bill, stated (98 Cong. Rec. (daily ed.) 4483):

> Now we come to this question of the finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned, but it is not final in that it is not the last remedy that the alien has. Section 10 of the Administrative Procedures Act is applicable. From that decision an appeal lies in the courts. If there is not a final administrative decision, then these aliens will go from one administrative body to another, seeking relief, because they do not want a final adjudication.
>
> * * * In view of the fact that every person who is ordered deported has all of these administrative processes available, plus an appeal to the court, plus the

> right to a writ of habeas corpus, I cannot conceive of a case where any injustice would be done by some capricious or arbitrary administrator.

Mr. Walter's explanation is particularly authoritative because in addition to being in charge of the immigration bill, he is generally regarded as one of those most responsible for enactment of the Administrative Procedure Act.

The conferees also appear to have shared Mr. Walter's view. The Conference Report (No. 2096, 82d Cong., 2d Sess., to accompany H.R. 5678) states:

> Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework and pattern of the Administrative Procedure Act.

Finally, the 1952 Act must be interpreted for constitutional reasons to permit injunctive review of deportation orders, including orders issued prior to the effective date of the Act. Otherwise, a deportee can be subjected to onerous and humiliating supervision requirements without having an opportunity to challenge before a judicial tribunal the validity of the deportation order on which the supervision requirements are based.

The Attorney General's authority to hold an alien in custody expires six months after the final deportation order has been outstanding (sec. 242(c)). Thereafter, however, the Attorney General may, under section 242(d), impose stringent supervision requirements, and this though the deportation order was issued "heretofore" (i.e., prior to the Act).

Under his supervision authority, the Attorney General may require the alien to appear from time to time before an immigration officer for identification, to submit to medical and psychiatric examination, to give such informa-

tion under oath "as the Attorney General may deem fit and proper," and "to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case." Violation of the supervision restrictions is a severely punishable felony. Sec. 242(d), 8 U.S.C. 1252(d).

If injunctive review of deportation orders is not available, an impossible situation is created for aliens who are not in custody, including those who, under the six-months rule, cannot be taken into custody.[1] The alien cannot test in court the validity of the deportation order, which causes him to be under a species of house arrest, short of subjecting himself to a felony prosecution by violating the supervision. Even then the alien has no assurance that the criminal court will permit a collateral attack on the validity of the deportation order. Such an alien, therefore, has no adequate judicial remedy against an invalid deportation order and its supervision consequences. Due process requires, however, that the alien be afforded judicial review of the constitutionality of the deportation order before he suffers its consequences. *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 51, 52; *Ng Fung Ho* v. *White*, 259 U.S. 276, 284-285. This review must be available by an adequate remedy, and a remedy which can be used only by risking criminal punishment is not adequate. *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331.

III.

The opinion of the Court states that "appellant relies primarily on § 10 of the Administrative Procedure Act." In fact, however, the Court does not even allude to the contention on which we primarily relied. This contention was that the finality provision of the Immigration Act has no bearing here because the suit attacks not the Attorney.

[1] This includes thousands of aliens whose deportation orders had been issued more than six months before the supervision restrictions became effective.

General's finding under the statute but the validity of the statute itself (Reply Brief for Appellant, pp. 1-3). Surely the point is not frivolous and merits consideration. During the oral argument, Mr. Justice Frankfurter clearly indicated his agreement with this contention, and we believe that its merit is shown in our Reply Brief.

The Court's opinion relies on habeas corpus decisions (most of them in exclusion cases) which held that the extent of judicial scrutiny of deportation orders was limited. The question here, however, is as to the appropriate remedy where the constitutionality of the statute is challenged. The *Elg* and *Kristensen* cases permitted injunctive and declaratory remedies where the issue was the authority of the Attorney General to act, as distinguished from a review of the "final" administrative order. This case also seeks to litigate the authority of the Attorney General to act. In *Elg* and *Kristensen*, the lack of authority arose from the litigant's citizenship or eligibility for naturalization, but lack of authority arising from the unconstitutionality of the underlying statutes surely places the administrative agency in no better position. The Court distinguishes *Elg* and *Kristensen* as having involved questions of status, but this distinction does not go to the principle involved. On principle, *Elg* and *Kristensen* are apposite.

As matters now stand, the Court has failed to consider the precise question posed by this case. That question is not whether deportation orders may, in general, be reviewed by injunction. It is whether injunctive relief is available from a deportation order entered under an unconstitutional statute.

IV.

Although the opinion disclaims, in a footnote, consideration of the 1952 Act, the text in its present form will, we believe, tend to be construed by bench and bar as an expression of a view by the Court that injunctive review of deportation orders is not available under the 1952 Act. The opinion states: